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Child's Right to Free Flow Information via Internet: Liability and Responsibility of the Internet Service Provider

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Abstract

Laws that govern the dissemination of information through internet are still struggling to control the flow of illegal information via web. This has in a way open up a path that leads to the corruption of an innocence mind of a child. The objectives of this study are to critically outline the extent of a child's right to information access. This research adopts the qualitative methodology as it provides a deeper understanding of social phenomena on the extent of liabilities of the internet service provider. The outcome of the study is to propose the amendment to the current relevant laws in Malaysia

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Keywords: Right to access of information; internet service provider; child

1. Introduction

A study (Jordan, W. H., 2006) in United States discloses that the largest consumers of online pornography are children between the ages of twelve and seventeen. In the aftermath, the existing regulation that governs the freedom of expression presents a challenge for the protection of child. Although these are old issues, their implications have become more significant in an environment in

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which anyone can become a publisher and create a website. Simultaneously, a child's interest to gain and acquire knowledge and access to information is fundamental right that needs to be preserved. However due to the immaturity of a child's mind that hinder them to foresee the negative and positive consequences of once act, need them to be put on continuous supervision. This paper critically analyse the relevant regulations domestic and from other advanced jurisdiction that limits the responsibilities and liability of the internet service provider to assist in protecting child's innocent mind. Summary of the result of this study is that the government of Malaysia promotes Freedom of Speech to all level of generation inclusive of child. However the rights come with uncertain boundaries as to what limit's the child's right to access information. The study will propose the amendment to the current relevant laws to adequately govern the rights and liabilities of ISP on this matter in Malaysia.

2. Literature Review

2.1. Child

Children under the Child Act 2001 is defined as a person under the age of eighteen years; and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility. Section 82 of the Penal Code (Cap 45) provides that a child below the age of ten cannot commit a crime. They will be treated as innocent or incapable of forming a guilty mind. However Section 83 of the Code further provides that a child above the age of ten but below the age of twelve must have understanding of the nature and consequence of his conduct on that occasion before he can be charged with the offence. Therefore the defense of *doli incapax* which means not capable of committing crime is not applicable. Under the Criminal Procedure Code (FMS Cap 6), a 'youthful offender' includes any child above the age of ten but below the age of 16 who has been convicted of an offence.

Under section 2 of the Age Of Majority Act 1971, any person of below the age of eighteen years old is considered a minor. They are said to have no capacity to enter into any contract. However this general rule is not absolute and it comes with exceptions. A minor is allowed to enter into the contract of marriage, divorce, dowry and adoption. The other exceptions of a child is laid down under the case principles which is any contract for necessities, contract that brings benefit to the child, scholarship and apprenticeship contract and contract of insurance.

Literature, (Ismail, N. & Aziz, N.A., 2008) agree that child as defined above are categorized as such in the eyes of the law for certain reason. Main factors that contribute to such categorization lie on their mental ability to differentiate what is right and wrong and the ability to foresee future consequences of their act. They are more easily controlled by the emotion rather than a mature thinking of oneself. It is axiomatic that children are in the process of growing up, both physically and mentally.

Literature (Ismail, N. & Aziz, N.A., 2008) further states that children may differentiate right from wrong: proponents of adult sentences for children correctly point out that most children, even a six-year-old, can parrot the phrase that it is "wrong" to kill, albeit often without any real understanding of what killing means or why it is wrong. But by virtue of their immaturity, children have less developed capacities than adults to control their impulses, to use reason to guide their behavior, and to think about the consequences of their conduct. They are, in short, still "growing up."

2.2. Internet Service Provider

The owner of facilities such as satellite earth stations, broadcasting transmission towers and equipment, mobile communications base stations, telecommunication lines and exchange, radio communication transmissions equipment and broadband fibre optic cables are categorized as network facilities provider (Girasa, R. J., 2002). Vakul Sharma in his book, *Information Technology Law and Practice: Cyber Law & E-Commerce* (Sharma, V., 2006) define a network service provider as an interactive network service. Depending upon its functional attributes a network service provider may act as an 'information carrier' or 'information publisher'. He elaborate further that an Internet Service Provider(ISP) to have the system similar to a virtual post office. It receives, stores and transmits electronic messages through its mail servers on behalf of another person.

He further discusses (Sharma, V., 2006) the need to differentiate between an ISP and a Search Engine. A search engine is a facilitator of information between two parties, that neither knows the content of the information nor the identity of the user. Whereas an internet service provider acted as an intermediary that link between an originator and an addressee. Looking into the scope of service provided by the search engine, both can be categorized as a service provider. However it does not mean that all intermediaries are network service providers.

In India, The Information Technology Act 2000 defines intermediary as any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message. This definition does not directly states that intermediary as to include internet service providers. However, literature (Girasa, R. J., 2002) emphasize further that this definition is intended to cover both professional and non professional intermediaries who performs any of the functions of an intermediary. As such an internet service provider falls under this definition.

Vakul Sharma again commented (Sharma, V., 2006) that the India Information Technology Act is absent in defining Network Service Provider which is any person who provides a communication service by means of guided or unguided electromagnetic waves and includes such other services as may be prescribed. It is also silent as to the meaning of transmission which means circulation or distribution of electronic record /message.

Another definition that relates to ISP is provided under section 230(e)(3) of the Communications Decency Act 1996(CDA) , United States of America, which elaborate the term “ interactive computer service” to mean any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Communication across the globe has spawned discussion group which have been organized into news group, electronic bulletin boards and electronic mailing lists for the exchange of views and experiences and the dissemination of information. Although the way in which they are set up and operated varies, they provide similar scope for the promulgation of material.(Rowland, D. & Macdonald, E., 1997)

In summary it can be said that the primary function of a network service provider is to provide access to the network. This could be in the form of dial-up, broadband, satellite, microwave or any other communication media. Network service providers may consist of telecommunication companies, data carriers, wireless communications providers, internet service providers, and cable television operators offering high-speed internet access. In relation to this article, Internet service provider provides the medium to transmit all categories of speech and expression to any categories of assessor. This is where the illegal content is posted and circulated. Therefore, to help protecting the child, we need to start from here.

2.3. *Right to Freedom of Expression and Access of Information*

This right sustains the human right to freely express one's opinion and to gather knowledge from someone else. Conversely the rights can only be applied with limitations. It was within the context of this right that a child is granted a right to access of information. Literature (Lyod, I., 2000) has stated that Internet has aggressively replaced the other mass media forms of expressing views. The reach of the Internet far surpasses any media known to date (Ng, C.L.Y., 2008). Its unique feature captures the attentions of many especially those who uphold the right to freedom of opinion and expression (Article 19:UDHR-United Declaration of Human Rights). Which carry out the meaning that any speech or expression of ideas will be shared speedily without barriers from the authorities.

In any democratic country, internet users claim right to freedom of speech and expression. This is a no exception to the children. Literature (Robert, C. J., 1998) agree on the word of Judge Stewart Dalzell in United States District Court deciding for the case of *Reno v ACLU* in 1996, who opined that the Internet deserves the highest protection from governmental intrusion to control the usage of the right to freedom of expression as it is the most participatory form of mass speech. Then again, literatures (Smith, G.J.H., 2007; Brolin, B., 2008) states that that Article 10 of the European Convention on Human Rights provides a wide definition of freedom of expressions which shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However it was further stated by this provision that the exercise of these freedoms, may be subject to certain formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.

It has been more than a decade, where back in 1996, many countries around the world became frightened of the freedom of speech associated with the Internet. China mandated that Internet users must register with the police. During the Tiananmen Square rebellion in China in 1990, the Internet kept Chinese communities around the world, especially in universities, in touch with the current events through email and the newsgroups, bypassing all government censorship (True, M., 2000). Germany banned access to some adult newsgroups on Computer. Saudi Arabia restricted Internet access to universities and hospitals. Singapore mandated that political and religious sites must register with the government. Another incident is in 1996, a radio station in Yugoslavia bravely exercised their right to freedom of speech and continued to broadcast over the Internet after all other normal broadcasting was shut down by one of the last remaining dictatorial governments in Europe, later overthrown. New Zealand courts ruled that computer disks are a type of "publication" that can be censored. None of these efforts had much lasting effect.

The political pressure to impose regulation in cyberspace is evident in government efforts to regulate indecency and obscenity. The most prominent case concerning freedom of expression and internet challenged the government authority to regulate speech with the Communications Decency Act and its successor the Child Online Protection Act (COPA). (Samoriski, J., 2002)

3. **Methodology**

This study adopts a qualitative research methodology. It anticipates two stages, which will draw upon primary and secondary sources. The first part is the library-based research on searching information through primary sources which consist of laws of Malaysia, policies of the government, the state and the judiciary, the rulings of the Malaysian Bar Council, the state bars while the secondary sources are consist of online databases including CLJ Law, LexisNexis, Ebscohost, Science Direct, Springerlink, Proquest and Emerald, documentary evidence such as statistics, relevant reports, acceptable usage policies of the ISP company and proceedings.

4. Results and Discussions

4.1. Liability of the Internet Service Provider

The potential of an ISP to be challenged under a civil or criminal suit depends on the knowledge, technical acts of avoiding any extra benefit forbidden by the law and exercising reasonable care in filtering all the information posted using its facilities (Charlesworth, A. & Reed, C., 2000). To date many advanced countries such as United Kingdom, European Union, United States of America and Australia has make attempt to define the scope of liability of the ISP in civil and criminal suit. These countries currently have advanced sets of law that governs this matter. The litigation in these countries had determined legal responsibility for the online hosting, publishing and possession of unlawful and illegal content (Kelly, J. X., 2007).

From the literatures (Anil, S., 2002; Price, D., 2001) made on the question of why are the ISPs are made to be the prime party to a civil suit, the followings reasons can be referred to:

- The main reason contributing to the act of the plaintiff in failing claims against a publisher or broadcaster rather than the individual is due to the higher possibility that the prior will be more likely to have resources to satisfy an award for damages.
- Network service providers may be more amenable to pay the claimants to settle the case rather than be embroiled in a long drawn court battle.
- In a situation where the network service provider is located in the claimant's home jurisdiction whilst the intermediary is located in a foreign jurisdiction, the tendency would be for a claimant to first exhaust all of his potential remedies against the network service provider before initiating suit against the originator of the offending information.
- The possibility for a user's identity to be impersonated and the use of anonymous re mailing services. Such a technique makes it impossible to identify the author without the co-operation of the operator of the r e mailing service.

The possibility of being sued for unknowingly allowing the downloading of illegal content by a child now makes the ISP expose and accountable for violating laws that previously applied to conventional media. (Girasa, R. J., 2002). The literatures seem to be unanimously summarized that the ISP must take a hands-off approach if they are to escape liability (Okumura, H., 2008; Hagimara, T., 2010; Anil, S., 2002)

4.2. The Development in UK and European Union

A shocking revelation was made in 1995, at the meeting of the British Association for the Advancement of Science where estimates put forward that half searches made using internet search engines were seeking pornographic material. (Lyod, I., 2000). This is worrying, knowing the ability of the present children to operates the new technology and the level of mind which are easily corrupted by the pornographic content. United Kingdom and European Union are very much advanced in handling the unsafe usage of the internet. In 1999, the European Commission created an action plan to promote the safe use of the internet which incorporate the intention to assist member states to develop self regulation system and filtering tools.

Their Internet Watch Foundation even suggested that Internet Service Provider shall be made liable for any illegal content publish within their medium. For this purpose the Internet service provider will be regard as the publisher and dispose to a suit under statutes such as Obscene Publications Act. In the context of internet, it can be categorized that an act of 'publication' includes 'distribution' also. However the development in UK states that ISP will not be categorized as author, editor or publisher if it only involved as the operator of or it has no effective control (Chris, R. & John, A., 2002). The European

Parliament Council has set an important precedent introducing the policy through a report of “Illegal and Harmful Content on The Internet Communication” by the Economic and Social Committee of the Regions which states that what is illegal offline must be illegal online.(Madieha, I., 2004)

In response to the need to regulate the internet content that bears the possibility to pollute child’s mind ,certain laws were amended on suggestion of the Committee. Their recommendations were given effect in the Criminal Justice and Public Order Act 1994 which amended sections in Obscene Publications Act 1959 and Protection of Children Act 1978(Rowland, D. & Macdonald, E., 1997). In 1994, the UK Protection of Children Act has been amended to extend the definition of photograph as to include computer data. This has widened the usage of the statute to include internet communication. While section 1(1) of the Obscene Publications Act 1959 makes it a criminal offence to publish any obscene article. Other relevant statute is the Children and Young Persons(Harmful Publications) Act 1955 which makes harmful content in pictorial form published in books, magazine or other like work will become an offence in any situation where it falls at the hand of children and young person.

4.3. The Development in United States of America

Right to freedom of expression in this country are provided under the First Amendment. Like other countries this right comes with limitation. The children deserves protection from exposure to games with graphic violence and strong sexual content.(Girasa, R. J., 2002). However the debates are the right under the First Amendment granted the child with the right to play video games without their parents’ permission. The development of cases in U.S shows that the court adopts a standard less strict to any material arguably harmful to minors so that the government may restrict minor’s access to some speech. The children may enjoy the rights but the rights are not as broad as the one enjoyed by the adult.(Ginsberg v. New York,390 U.S 629(1968);Tinker v Des Moines Independent Sch.Dist.,393 U.S 503(1969); West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624(1943); Board of Education of Island Trees v. Pico,457 U.S 853(1982).

The possibility of being sued for unknowingly obscene and pornographic character now makes the ISP accountable for violating laws that previously applied only to journalist and music producers. This issue has alarmed the government to enact statutes to govern the matter. In United States the Communication Decency Act 1996(CDA) has answered the call to legislate on the censorships of speech via internet and also provides for the liabilities of ISP under such claim. When the US Government passed the Communications Decency Act (CDA) prohibiting distribution of adult material over the Internet, the law was widely believed to be unenforceable and unconstitutional (Ndung’u, K. S., 2003). This gave birth to a blue ribbon campaign to show support for freedom of speech on the Internet.

The purpose of this Act specifically through Article 230 of the Act, is to promote good conduct of the ISP. The US Congress enacted Communications Decency Act in 1996, not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. Through this act, the ISP is said not to be liable for their failure to edit, withhold or restrict access to offensive material distribute through their channel. The prohibition is specifically provided under section 230 of the said act. Many authors has summarized (Klett, A., 1997; Shnyder, S. & Shaw, K., 2003) that this section has create immunity to any cause of action that would make service providers liable for information originating with a third party user of the service.

In 1998 Children’s Online Privacy Protection Act was enforced with the purposes to enhance the parental role in protecting the privacy of their children, protect children in cyberspace chat rooms, home pages, maintain security of personal identifying information and information collected online and limit

access without parental consent. Under this Act, any materials deemed "harmful to minors" would be banned from cyberspace, effectively re-instituting the CDA (Wollstein, J. B., 1999). This Act provide on the liability of Internet service provider, where they are subject to be prosecuted and commit an offence if they knowingly collect personal information from a child unless:

- It provides notice on the Web site of the nature of the information collected
- How such information is to be used
- The operator's disclosure practices for the information
- The operator must obtain verifiable parental consent

4.4. The Development in Malaysia

Malaysia has not been exempted from the current scenario of freedom of expression for the internet users. Conceptualized in 1996, the Multimedia Super Corridor Malaysia (MSC), directly allowed all information to be disseminated freely without any censorship. Under the MSC, one of the government promises to the foreign counterparts is that there will be no censorship on the Internet. This assurance was embodied in section 3 (3) of the Communication and Multimedia Act 1998.

The development of information communication technology (ICT) and convergence technology in the form of satellite and digital has brought a significant change to the legal development of media and communication in Malaysia (Jalil, J. A., 2002). The chilling effect of a lawsuit could curtail freedom of expression in a medium that has the potential to offer citizens the kind of media access that used to be available only to politicians and owners of newspaper and broadcast stations. The Constitution of Malaysia through Article 10 provides for freedom of speech and freedom of the press. However, some forms of speech are thoroughly outlawed in Malaysia.

In practice, the Malaysian Government restricted freedom of expression and intimidated most of the print and electronic media into practicing self-censorship. Article 10(2) provides for the restrictions over freedom of expression on any matter in the interest of the security of the federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly. The restriction of public order and morality can be construed to limit any speech or expression that might lead to the contamination of a child's mind.

The Communications and Multimedia Act 1998 outlines guidelines for voluntary self-regulation of ISP's. The Communications and Multimedia Act of 1998 ("CMA") and the Communications and Multimedia Commission Act of 1998 ("CMCA") together directly govern Malaysia's telecommunications, broadcasting, and Internet sectors, including related facilities, services, and content. The commission takes the position that Internet content must be regulated and controlled for "reasons of access, privacy and security and protection of individual rights.

The CMA empowers the commission with broad authority to regulate online speech, providing that "no content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person." Publishers of media content in violation of this provision may face criminal penalties, including a fine of up to RM50,000 and/or a maximum of one year in prison. The CMA also establishes the Content Forum, which formulates and implements the Content Code-voluntary guidelines for content providers concerning the handling of content deemed offensive and indecent. The liability of ISP in disseminating illegal content has not been elaborated elsewhere other than the statute. To date no cases have been filed to Malaysian court on any such claims.

All of the laws did not specifically discuss on the protection towards a child from illegal and harmful information. None of Malaysian case have been brought to court suing the owner of the illegal information neither the Internet service provider for disseminating such information. This makes

Malaysian very much behind in interpreting the laws on protection of child against harmful information. This does not justify that Malaysian children are drawn away from the access to the illegal and harmful content via internet. Our children are very much advanced and keeping up progressively with the development. Having this in mind, writers are of the opinion that there is a need for the law to intervene.

5. Conclusions

In summary it can be said that, while the Malaysian constitution places an extremely high value on and provides protection for freedom of speech, such speech is not completely unbridled. The same apply for a child's right to free flow of information. This right need to be restricted. Looking at the development in various countries above, it can be summarized that Malaysia is currently at a drawback on the legal framework that governs this matter. This does not means that Malaysian children are innocent and not catching up with the development of the internet. Filing a suit towards an ISP, would be much easier because unlike the owner of the illegal content, ISP are not anonymous. Yet this will not solve the problem in total. Suing an ISP is the action taken after breach had happen. But when a child's future is at stake, the appropriate action would be the prevention. For this matter a domestic or in house control would suits the purpose. Many complaints have been made by the Malaysian parent on the inability to control own child from the negative impact attached with the right to free flow of information. The technology has invented something which traditionally does not fall under the restriction to freedom of expression now falls within the ambit of the restrictions. There is a need to reform the current existing law in Malaysia in governing the illegal content posted on the web that potentially corrupt a child's mind. The matters that should be of prior consideration are to have laws that make compulsory the insertion of filtering software in each new computer. Filtering software must be operated by the parents or guardian to the child for the purpose of restricting websites that potentially would corrupt the child's mind.

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